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IN THE COURT OF APPEALS OF INDIANA

JESUS LOZANO RODRIGUEZ,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 48A02-0803-CR-287
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MADISON CIRCUIT COURT
The Honorable Fredrick R. Spencer, Judge
Cause No. 48C01-0609-FA-374

JUNE 6, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARTEAU, Senior Judge

STATEMENT OF THE CASE

Defendant-Appellant Jesus Lozano Rodriguez appeals the three-year sentence he received for sexual battery, a Class D felony, Ind. Code § 35-42-4-8.[1] We reverse in part but affirm the sentence imposed.

ISSUES

Rodriguez presents two issues for our review, which we restate as:

I. Whether the trial court abused its discretion in finding a certain aggravating factor.

II. Whether the sentence imposed was inappropriate under Ind. Appellate Rule 7(B).

FACTS AND PROCEDURAL HISTORY

This case has been appealed once before, and in a memorandum decision we reversed and remanded for re-sentencing. *See Rodriguez v. State*, No. 48A04-0704-CR-189, 874 N.E.2d 406 (Ind. Ct. App. October 3, 2007). In the previous opinion, we made the following statement of the facts:

> In September 2006, Rodriguez forced his way into the female victim's apartment, struggled with the victim, and attempted to have sexual contact with the victim. On November 17, 2006, Rodriguez pleaded guilty to sexual battery, as a Class D felony, and operating a vehicle with an ACE of .08 or more, as a Class C misdemeanor. On that same day, Rodriguez was sentenced to three years on the D felony and thirty days on the C misdemeanor, to be served concurrently. It is from this sentence that he now appeals.

[1] Rodriguez does not appeal his sentence for operating a vehicle with an alcohol concentration equivalent (ACE) of .08 or more, a Class C misdemeanor. This sentence was ordered to run concurrently with Rodriguez's sentence for sexual battery.

Memorandum Decision at 2.

DISCUSSION AND DECISION

I. AGGRAVATING FACTOR

Ind. Code § 35-50-2-7 provides that the fixed term for a Class D felony is between six months and three years, with the advisory sentence being one and one-half years. On re-sentencing, the trial court found two aggravators before imposing the maximum three-year sentence: (1) that Rodriguez exposed himself to the victim during the attack; and (2) that Rodriguez was an illegal alien. The trial court also found three mitigators: (1) lack of criminal history; (2) guilty plea; and (3) work ethic. Rodriguez contends the trial court erred in finding as an aggravator that he exposed himself to the victim during the attack.

In *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on rehearing*, 875 N.E.2d 218 (2007), our supreme court held that trial courts are required to enter sentencing statements whenever imposing sentence for a felony offense. The statement must include a reasonably detailed recitation of the trial court's reasons for imposing a particular sentence. *Id*. If the recitation includes the finding of aggravating or mitigating circumstances, then the statement must identify all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating. *Id*. Sentencing decisions are subject to review on appeal for an abuse of discretion. *Id*. One way in which a trial court may abuse its discretion is to fail to enter a sentencing statement at all. *Id*. Another, is to enter a sentencing statement that explains reasons for imposing a sentence and the record does not support the reasons, the

statement omits reasons clearly supported by the record, or the reasons given are improper as a matter of law. *Id*. at 490-91.

During the guilty plea hearing, a factual basis was established by the State. The State noted that the victim stated that she opened the door to him because she believed that he was one of her neighbors. Rodriguez pushed his way in and shut the door. Rodriguez then forced his body against the victim's, and she pushed him away. Rodriguez fell into a cat litter box, grabbed the victim's leg, and began licking and biting it. He then picked the victim up by one leg and pulled her into the bedroom. He lay on top of the victim and began pulling her jean pants. As the victim attempted to keep her underwear and pants on, Rodriguez forcefully attempted to take them off. During her attempts to keep him from removing her clothes, "she feels his penis." (Sentencing Transcript at 15). The assault was interrupted when the phone began ringing, and Rodriguez left the victim's home.

We must agree with Rodriguez that the factual basis is insufficient to sustain the trial court's conclusion that he exposed himself. There is no mention of Rodriguez removing his clothes or pulling out his penis. The factual basis appears to indicate that the victim could feel Rodriguez's turgid penis through his clothes.

The trial court therefore erred in determining that an exposed penis was an aggravating circumstance.

II. INAPPROPRIATE SENTENCE

A sentence authorized by statute will not be revised unless the sentence is inappropriate in light of the nature of the offense and the character of the offender.

Indiana Appellate Rule 7(B). We must refrain from merely substituting our opinion for that of the trial court. *Sallee v. State*, 777 N.E.2d 1204, 1216 (Ind. Ct. App. 2002), *trans. denied*. In determining the appropriateness of a sentence, a court of review may consider any factors appearing in the record. *Roney v. State*, 872 N.E.2d 192, 206 (Ind. Ct. App. 2007), *trans. denied.* The "nature of the offense" portion of the appropriateness review concerns the advisory sentence for the class of crimes to which the offense belongs; therefore, the advisory sentence is the starting point in the appellate court's sentence review. *Anglemyer v. State*, 868 at 491. The "character of the offender" portion of the sentence review involves consideration of the aggravating and mitigating circumstances and general considerations. *Williams v. State*, 840 N.E.2d 433, 439-40 (Ind. Ct. App. 2006).

In reviewing the nature of the offense, the State urges us to take note that the particular facts admitted go well beyond the elements of a sexual battery. It reasons that while the trial court may not use dismissed charges as aggravating circumstances, this court may do so. The State cites *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006) for the proposition that "even where the trial court has been meticulous in following the proper procedure in imposing a sentence, [a reviewing court] may exercise [its] authority under Appellate Rule 7(B) to revise a sentence [it] conclude[s] is inappropriate in light of the nature of the offense and the character of the offender," and it argues that *Childress* can go well beyond the consideration of aggravating and mitigating circumstances in conducting our review. Appellee's Brief at 7. We cannot accept the State's interpretation of *Childress* as it clearly applies to the downward revision of a sentence deemed

inappropriate by the reviewing court. However, in reviewing the nature of the offense, we note that Rodriguez not only committed sexual assault he also endangered other citizens by driving while under the influence of alcohol.

With regard to the character of the offender, we note that even though the trial court counted Rodriguez's lack of criminal history as a mitigator, Rodriquez's history is somewhat confusing. When asked if he had ever been arrested, his initial answer was, "No, nothing bad." (Tr. at 26). Given this answer, we are not inclined to classify Rodriguez as "squeaky clean." Furthermore, Rodriguez's plea is of little significance as he reaped a substantial benefit from pleading guilty to a Class D felony in exchange for the dismissal of rape, a Class B felony. Finally, we note that our supreme court has held that "being an illegal alien is itself more properly viewed as an aggravator than a mitigator." *See Samniego-Hernandez v. State*, 839 N.E.2d 798, 806 (Ind. Ct. App. 2005), *abrogated on other grounds by Anglemyer* (citing *Yemson v. U.S.*, 764 A.2d 816, 819 (D.C.App. 2001) for the proposition that "in sentencing a criminal defendant, [a] court cannot treat [a] defendant more harshly than any other citizen solely due to [the] defendant's national origin or alien status, but that does not mean that [the] court must close it eyes to [the] defendant's illegal alien status and disregard for the law, including immigration laws).

Given the fact that Rodriguez endangered not only the victim of his sexual attack but also innocent citizens driving on Indiana streets, coupled with the lack of strong mitigating factors, we cannot say that the three-year sentence is inappropriate.

Reversed in part and affirmed in part.

DARDEN, J., and BAILEY, J., concur.